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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 ANTHONY D. DIORIO,

9 Petitioner,

10 v.

11 JEFFREY A. UTTECHT,

12 Respondent.

CASE NO. C19-5396 BHS

ORDER ADOPTING REPORT
AND RECOMMENDATION

13 This matter comes before the Court on the Report and Recommendation (“R&R”) of the Honorable David W. Christel, United States Magistrate Judge, Dkt. 15, and
14 Petitioner Anthony D. Diorio’s (“Petitioner”) objections to the R&R, Dkt. 16.

15 On May 8, 2019, Petitioner filed a proposed petition for writ of habeas corpus
16 pursuant to 28 U.S.C. § 2254. Dkt. 1. Petitioner challenges his incarceration under a state
17 court judgement imposed for his conviction by jury verdict for attempted rape of a child
18 in the second degree and communication with a minor for immoral purposes. Dkt. 13, Ex.
19 1. Petitioner appealed his conviction to the state Court of Appeals, and that appeal
20 remains pending. *Id.*, Ex. 2; *see also* <http://www.courts.wa.gov/opinions/> (populated with
21 search terms for case no. 52684) (last visited Dec. 12, 2019).
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1 In his federal habeas petition Petitioner raises four grounds for relief, all of which
2 are premised on the allegation that his conviction violated his rights under the Fifth
3 Amendment because he was charged by information, rather than by an indictment issued
4 by a grand jury. Dkt. 6. On July 22, 2019, Respondent answered. Dkt. 12. Respondent
5 maintained that the petition should be dismissed because Petitioner's state court remedies
6 are unexhausted. *Id.* On July 25, 2019, Petitioner replied. Dkt. 14.

7 On September 11, 2019, Judge Christel issued the R&R recommending dismissal
8 of Petitioner's petition for failure to exhaust state judicial remedies. Dkt. 15. On
9 September 18, 2019, Petitioner filed objections to the R&R. Dkt. 16.

10 The district judge must determine de novo any part of the magistrate judge's
11 disposition that has been properly objected to. The district judge may accept, reject, or
12 modify the recommended disposition; receive further evidence; or return the matter to the
13 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

14 First, Petitioner contends that his conviction violated his right to equal protection
15 of the law and that federal courts have original jurisdiction over this claim pursuant to 28
16 U.S.C. § 1343.¹ Dkt. 16 at 1. Petitioner contends that the district court has a statutory
17 obligation to hear his petition before its claims are considered by the Washington courts
18 pursuant to this grant of original jurisdiction. *Id.* Petitioner, however, readily
19 acknowledges that he "submitted a Writ of Habeas Corpus pursuant to 28 U.S.C.

21 ¹ 28 U.S.C. § 1343 confers original jurisdiction on the district court to "redress the deprivation,
22 under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or
immunity secured by the Constitution of the United States" 28 U.S.C. § 1343.

1 § 2254.” *Id.*; *see also* Dkt. 1 (proposed petition for writ of habeas corpus), Dkt. 6
2 (petition for writ of habeas corpus).

3 The Supreme Court has held that “a state prisoner must normally exhaust available
4 state judicial remedies before a federal court will entertain his petition for habeas
5 corpus.” *Picard v. Connor*, 404 U.S. 270, 275 (1971). Moreover, § 2254(b)(1) provides
6 that a district court “shall not” grant an application for a writ of habeas corpus unless the
7 prisoner has first “exhausted the remedies available” in state court. 28 U.S.C.

8 § 2254(b)(1). A petitioner’s claims will be considered exhausted only after “the state
9 courts [have been afforded] a meaningful opportunity to consider allegations of legal
10 error without interference from the federal judiciary.” *Vasquez v. Hillery*, 474 U.S. 254,
11 257 (1986). Consequently, “state prisoners must give the state courts one full opportunity
12 to resolve any constitutional issues by invoking one complete round of the State’s
13 established appellate review.” *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). In this
14 case, Petitioner’s direct appeal is still pending and the time to file a collateral attack in
15 which he could present these same claims via a personal restraint petition has not expired.
16 Therefore, the Court agrees with Judge Christel that Petitioner has failed to fully exhaust
17 his state judicial remedies and this Court must dismiss his petition without prejudice. *See*
18 *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (stating that a federal court must
19 dismiss a federal habeas petition if its claims are unexhausted). Accordingly, Petitioner’s
20 objection on the basis that the district court has a “duty” to hear his claims is denied.

21 Second, Petitioner argues that he meets a statutory exception to the exhaustion
22 requirement because “the state has a statute in place, which expressly forecloses relief on

1 the merits of petitioner’s procedural situation.” Dkt. 16 at 2. Petitioner does not identify
2 the statute. *Id.* 28 U.S.C. § 2254(c) provides that “[a]n applicant shall not be deemed to
3 have exhausted the remedies available in the courts of the State, within the meaning of
4 this section, if he has the right under the law of the State to raise, by any available
5 procedure, the question presented.” In Washington, criminal defendants have a statutory
6 right to direct appeal and collateral attack. *See, e.g.*, RCW Chapter 10.73; *see also* Wash.
7 R. App. P. §§ 2.2(a), 5.1, 6.1, 16.3, 16.4. Because Petitioner has the right to raise the
8 questions he presents in his federal petition in the state court, and indeed, is availing
9 himself of that right currently via his direct appeal, he “shall not be deemed to have
10 exhausted” his state judicial remedies. Therefore, his objection on this basis is denied.

11 Third, Petitioner continues to argue that state courts lack jurisdiction to adjudicate
12 his claim that the manner in which he was charged violates his constitutional right to
13 indictment by a grand jury. Dkt. 16 at 4. Since 1886, however, the Supreme Court has
14 affirmed that a state prosecutor does not violate the Due Process Clause of the Fourteenth
15 Amendment by bringing charges based on a criminal information as opposed to an
16 indictment issued by a grand jury. *Hurtado v. People of State of California*, 110 U.S. 516
17 (1886). Regardless, Petitioner must exhaust this claim in the state court before this Court
18 will consider it in a federal habeas petition.

19 Finally, Petitioner’s assertion that he has a right to indictment by grand jury as a
20 state prisoner that stems from the Privileges and Immunities Clause of the Fourteenth
21 Amendment rather than the Due Process Clause of the Fourteenth Amendment, *see* Dkt.
22 16 at 4, does nothing to alter the Court’s conclusion that he has failed to exhaust the

1 claims raised in his federal habeas petition. Said another way, whether Petitioner brings
2 his claim of a constitutional violation under the Due Process Clause or the Privileges and
3 Immunities Clause is irrelevant to whether the claim has been exhausted. Consequently,
4 Petitioner's objection on this basis is also denied.

5 Petitioner lodges numerous other objections that are meritless. Therefore, the
6 Court having considered the R&R, Petitioner's objections, and the remaining record, does
7 hereby find and order as follows:

- 8 (1) The R&R is **ADOPTED**;
- 9 (2) Petitioner's habeas petition is **DISMISSED without prejudice**;
- 10 (3) A Certificate of Appealability is **DENIED**; and
- 11 (4) The Clerk shall enter **JUDGMENT** and close this case.

12 Dated this 16th day of December, 2019.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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